

The End of Jury Trials: Covid-19 and the Courts: The Implications and Challenges of Holding Hearings Virtually and in Person During a Pandemic from a Judge’s Perspective

Ed Spillane*

Covid-19 has vanquished many institutions. Those who have not completely succumbed to the virus’ onslaught have been slow to recover their usual form. Courts have been no different. Initially, we closed our court in mid-March 2020. Virtually every court in Texas and the United States by late March had done the same. At that point, those embracing technology attempted to adapt Zoom and Zoom-like virtual meeting places to the judiciary. By late April and May, many courts reported that the virtual court of Zoom allowed courts to move some dockets. As a judge, I have been able to do multiple arraignments, sentencing hearings, pre-trials, and even bench trials via Zoom.¹ By the end of May, judges became eager in various states to have jury trials, in-person court hearings, and even hybrid virtual hearings. This almost seemed to follow the desire of citizens to get out of quarantine and live “normally” again.

I’ll examine the challenges and process of trying to “hold court” during the pandemic. While this discussion may be centered on my experiences and courts in Texas, many of our experiences, challenges, and techniques have been universal in the United States. In fact, the ability to hold jury trials has almost completely grounded to a halt since March 2020. The pandemic has forced court participants to

* Ed Spillane is the Presiding Judge of the College Station Municipal Court in College Station, Texas. Judge Spillane is also on the Texas Judicial Council, the National Task Force on Fines, Fees, and Bail Reform, the Texas Municipal Courts Association Board of Directors, and the Advisory Board of the Data Collaborative for Justice (formerly called the Misdemeanor Justice Project) at the John Jay College of Criminal Justice.

¹ Since March 2020, I have conducted court hearings mostly virtually; whereas, before March the statutes virtually eliminated the ability to conduct criminal court proceedings in Texas in any manner but in-person. Texas allows limited abilities to conduct video conferencing for jail magistration, commitment, or inability to pay, *capias pro fine* show cause hearings. *See* TEX. CODE CRIM. PRO. ANN. art.15.17, 45.046, and 45.021 (West). On March 13, 2020 the Texas Supreme Court and the Court of Criminal Appeals issued a First Emergency Order Regarding the Covid-19 State of Emergency allowing all proceedings to occur virtually. First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9042 (Tex. Mar. 13, 2020). With subsequent Emergency Orders, specifically the third and twelfth, the Texas Supreme Court and the Court of Criminal Appeals prohibited nonessential hearings from occurring in-person and encouraged courts to conduct all hearings virtually whenever they can. *See* Third Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9044 (Tex. Mar. 19, 2020); Twelfth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9044 (Tex. Apr. 27, 2020).

question the value of various dockets and how we hold these court hearings and appreciate what we all have lost in terms of in-person connectedness.

I. EARLY PANDEMIC

I am the presiding judge of a municipal court in the city of College Station, Texas. We handle primarily criminal cases. Once a defendant has pled or been found guilty, the defendant can engage in ex parte contact with the court.² Also, procedural information can be the substance of ex parte contact at any time. Most of the defendants in municipal courts in Texas are pro se; in other words, they represent themselves and do not hire an attorney. Texas municipal courts' jurisdiction includes most traffic violations, driving under the influence of alcohol, theft under \$100, disorderly conduct, assault, and public intoxication offenses. These are all classified as misdemeanor offenses. Municipal courts also handle civil forfeitures, nuisance cases, property hearings, and animal abuse and neglect actions. In Texas, municipal courts are the primary courts with which citizens on a daily basis have contact, both as defendants and as jurors.³

My attitude and reaction in late February and early March to the pandemic were clear. I knew that the virus was a threat outside of the United States and we needed to be at least cautious. By early March the threat of the virus was real in the United States. While we felt less worried in the South than other places in the United States, the cancellation of meetings, vacations, and hearings became a reality. What had seemed a distant problem in February became a clear danger as institutional shutdowns began.

As a precaution, I cancelled all requirements to do any in-person classes as a condition of probation and waived any requirement to perform community service. We immediately attempted to call defendants to let them know about these changes, posted them on our court website, and inserted these changes on all future mailings and court paperwork. Maintaining contact with defendants is always important for any court, but I became aware with each passing week how difficult and imperative preserving a connection to defendants was both to us and our defendants.

The city of College Station, Texas, is the home of Texas A&M University, which has approximately 64,300 students, most of whom are undergraduates.⁴ I see a number of college-aged defendants. For the past several years, I had provided my email address to these defendants during a class all college-aged defendants had to take for non-traffic offenses. This class allowed me to teach defendants how to

² TEX. CODE OF JUDICIAL CONDUCT, Canon 6 C(2)(f).

³ TEX. OFFICE OF COURT ADMIN., TEXAS PUBLIC CONFIDENCE AND TRUST SURVEY (2018), <https://www.txcourts.gov/media/1442332/public-trust-and-confidence-survey-topline-report.pdf> (surveyed approximately 600 Texas citizens, 18 years of age or older, and reported that municipal courts and justice courts were the most common courts citizens had attended, with traffic cases being the number one type of case).

⁴ *Texas A&M at a Glance*, TEXAS A&M UNIV., <https://www.tamu.edu/about/at-a-glance.html>.

expunge their cases under recent Texas laws permitting defendants to clear most non-traffic criminal cases in municipal court. It is my experience that defendants starting at age 18 and onward are very interested in clearing any criminal cases on their “record” as they apply for graduate schools and various jobs performing background inquiries. Also, the explosion of personal data online has increased the awareness of the collateral consequences of being involved in the criminal justice system, including the most routine and least severe misdemeanor criminal offenses, such as underage drinking, shoplifting, disorderly conduct noise violations, or possession of marijuana.

Starting in early March, everyone at our court, including myself, the presiding judge, offered our email addresses to all defendants through every communication contact we could employ. As earlier stated, I had provided the ability to email the court in a limited way. Now every defendant had to be able to reach our court electronically or by phone. I was cognizant of those defendants who perhaps had limited or no internet access. We discovered over time, as schools and other organizations increasingly utilized virtual, remote communications, that the number of citizens without internet or cell phone data access to the internet was less than one percent of our contacts. The number of our defendants without phone access was almost nonexistent; however, we do not have many homeless defendants, so the limits of this access may vary from court to court.

I had cancelled all of my classes and any obligation to attend any other in-person class. The providing to defendants of our email addresses and the encouragement of using email communications have continued to be invaluable for several reasons: defendants and the court are able to communicate in a safe, swift manner and defendants can file with the court necessary paperwork from remote locations. Defendants now send me dozens of daily emails on their cases, which has established not only a swifter communication between us, but has also allowed a personalized interaction that, although not in person, is familiar, comforting, quick, and understandable.

On March 13, 2020, the Texas Supreme Court and the Texas Court of Criminal Appeals made two very key rulings: one, any procedure which was statutorily obligated to be done in the courtroom could be performed by phone or virtually, and two, any court deadlines were suspended until May 8, 2020. This was later extended to July 15, 2020.⁵ The Texas Supreme Court currently explicitly encourages holding

⁵ First Emergency Order Regarding the Covid-19 State of Disaster, Misc. Docket No. 20-9042 (Tex. Mar. 13, 2020); Twelfth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9044 (Tex. Apr. 27, 2020). The Governor’s Disaster Declaration allowed the Texas Supreme Court to “modify or suspend procedures for the conduct of any court proceeding affected by a disaster declared by the governor.” OFFICE OF THE TEX. GOVERNOR, COVID-19 DISASTER PROCLAMATION (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>; see TEX. GOV’T. CODE ANN. §§. 22.0035(b), 24.033(b) (district courts), 25.0019(b) (statutory county courts), 25.0032(b) (statutory probate courts), 26.009(b) (constitutional county courts), 27.0515 (justice courts), 29.015 (municipal courts), and 30.000123 (municipal courts of record) (allowing for courts to host hearings away from their typical locations).

whatever court proceedings we can by virtual means, versus in-person, and has pushed back the ability to do jury trials until December 1, 2020.⁶ Trying to hold jury trials has been the most challenging of all court procedures to try to carry out during the pandemic. This is true not just in Texas, but nationally as well.

II. PANDEMIC SHUTDOWN

On March 16, 2020, the doors to our court were locked to the public, and we all worked mostly from home. Once a day one clerk would pick up the mail delivered to our court. Each of our clerks possessed laptops and were able to take phone calls made to our court at home using their laptops. We also offered our clerks cell phones so that they could contact defendants to assure them that any deadlines were lifted and that they could communicate with us by phone and email. The State of Texas continued to file criminal cases in our court, but the filings were markedly down compared to the same time period the year before.⁷

In mid-March, the Texas Supreme Court, through the Office of Court Administration, offered every judge in Texas a free executive Zoom account with instructions on how to use the account and set up a YouTube channel to live stream the Zoom proceedings to the public. All courts were encouraged to use Zoom to reach out to court participants virtually.

III. VIRTUAL TRIALS

While Zoom and other virtual software appear to be a way of life for many people now, when our court shut down this was all very new to us. In-person contact had been the lifeblood of court operations and certainly judicial hearings. The ability to face your accuser is a longstanding cornerstone of criminal law. Appearing before a judge, often wearing a black robe, had been a daily part of my practice as a felony prosecutor for eight years, and eighteen years as a judge. The absence of this routine suddenly struck almost every court in the United States as most courts closed down not only their buildings but also any in-person hearings. If courts were to function, they would have to operate as so-called “virtual courts.”

In Texas, judges from all the different types of courts embraced holding virtual hearings on Zoom. The Office of Court Administration set up a page listing the YouTube channels of all the courts, and an observer of this page could also see when the court was in session and livestreaming. Based on the activity on this page, the head of the Office of Court Administration, David Slayton, estimated that by the end of April over 100,000 citizens had participated in thousands of virtual hearings

⁶ Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9004 (Tex. Sept. 18, 2020).

⁷ 2,720 new cases were filed in the College Station Municipal Court March 2020 through July 2020, compared to 8,743 filed March 2019 through July 2019. Municipal Court activity can be accessed at <https://card.txcourts.gov/ReportSelection.aspx>.

across Texas. On March 23rd, Texas courts held 101 hearings; by May 14th, courts held 1,083. From March to August, Mr. Slayton estimates that there have been over 700,000 hours logged in Texas courts for “virtual sentencings, motion hearings and more.”⁸ From March through September 15, 2020, 1,859 judges from various types of courts in Texas conducted over 500,000 hearings involving 1,446,001 participants over 1,084,545 hours broadcasted on 1,154 different court YouTube channels.⁹

Virtual hearings encompassed the usual short pretrial hearings that make up many court dockets. The livestreaming on YouTube preserved the requirement to hold proceedings open to the public yet allowed the judge to manage who was actually participating in the Zoom hearing.

Before the pandemic, I had limited experience conducting virtual court in my communications with defendants in the jail following their arrest. I had, for over a decade, conducted jail arraignments over the internet with the GoToMeeting service. Jail arraignments in Texas are essentially the first appearance of a defendant who has been arrested before a magistrate and takes place within twenty-four hours after arrest. The magistrate reviews the probable cause for the arrest and also sets a bond. Texas in 2013 allowed magistrates by live video at the same time to take the plea from the defendant in jail as well.¹⁰ This is the reason this procedure is called a “jail arraignment”. As a judge, I would always release immediately from jail any defendants I saw during this “jail arraignment.” For the past several years I have had a standing order for an automatic release from jail upon arrest, so I do not actually conduct jail arraignments that often now.

Thus, while my experience with video jail arraignments was longstanding timewise, the substantive nature of my interactions was thin. All the defendants I saw during video jail arraignments were quickly released from jail, and the discussions were not lengthy. In fact, upon any discussion requiring more clarification, I would often direct the defendant to meet in-person with me or one of our skilled clerks at our court upon release. I realized that defendants in jail will agree to anything when appearing before a judge to seek release from jail. The courtroom or a payment plan office provides a more calm or private atmosphere to explain the details of their financial obligations or health situation when requesting community service or waiver of their punishment, compared to that of a jail.

However, my experience with video jail arraignments was mostly positive. It did allow a safe (for the judge) way to conduct the hearing in an actually more open setting: my courtroom. Also, video jail arraignments by law had to be recorded so that was always available should there be some question on what was said.

⁸ Justin Jouvenal, *Justice by Zoom: Frozen video, a cat-and finally a verdict*, THE WASHINGTON POST (Aug. 12, 2020), https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat--and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html.

⁹ TEX. JUDICIAL COUNCIL, DIRECTOR’S REPORT 15 (Sept. 2020), <https://www.txcourts.gov/media/1449762/directors-report-september-2020-final.pdf>.

¹⁰ TEX. CODE CRIM. PRO. ANN. art. 15.13, 45.023(c) (West).

There has been some controversy with video arraignments in other states. Research indicates that from 1999 to 2007, judges in Cook County, Illinois set substantially higher bail amounts on defendants once the county implemented video bond hearings in 1999.¹¹ My video bail hearings are completely different than those in Cook County, Illinois due to the fact that every defendant I saw via videoconferencing I released immediately. As stated, however, that does not remove the fact that there is a difference between in-person interaction and virtual interactions. Children testifying via remote closed-circuit television have been found to be less credible and accurate than children testifying in-person according to a mock jury.¹²

I decided that I would conduct plea dockets, pretrial hearings, administrative civil trials, and criminal bench trials through Zoom. Essentially any hearing besides jury trials was fair game for immediate virtual hearings. I did not set these hearings via subpoena. Our clerks would contact defendants, defense attorneys, prosecutors, and witnesses and provide the Zoom link invite. As long as every party to the particular hearing agreed to conduct the hearing virtually, we would proceed forward. I did not feel that an individual who did not want to participate virtually should have to participate, and, thus, I did not like the idea of a subpoena or even an official court setting to somehow imply that participation was mandated as most in-person court appearances have been. My docket coordinator, besides providing the zoom invites, had to keep in consistent contact with parties to remind them of the hearing. It seems during the pandemic many of us have lost a sense of time and, thus, virtual events on a calendar are easy to forget.

From a participation aspect, what have been the results? So far, I have had only two cases in which participants did not want to participate virtually. One case was a bench trial in which the defendant did not have internet access. The other case involved a bench trial concerning an assault charge and the victim did not want to testify at home while her children were in the house. Otherwise, all parties have agreed so far to participate in the virtual hearings. Are there parties who perhaps do not have a sufficient understanding of the procedures to make a decision, particularly those defendants representing themselves? That surely can be true, even with in-person proceedings involving pro se defendants. However, from an empirical perspective, a vast majority of parties including attorneys, have agreed to participate in the virtual proceedings, knowing that at the present time in-person proceedings are not offered and also may not be safe.

One of my first Zoom hearings actually was one of my most challenging: a bench trial involving a defendant accused of disorderly conduct by exposure of his

¹¹ Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010).

¹² See Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Ability to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 L. & HUM. BEHAV. 339 (2001); see also Gail S. Goodman et. al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 L. & HUM. BEHAV. 165 (1998).

genitals in public. While trials are in public and the courtrooms should have plenty of seating to encourage the public to watch at any time, they often do involve sensitive subject matter. My first YouTube bench trial, broadcasted on the worldwide web, included a digital police bodycam tape of an individual taking all of his clothes off and openly cursing the police. The trial, however, went smoothly. All the witnesses appeared, and each side was able to ask questions through direct and cross-examination and finish with arguments as at every bench trial we hold. The exhibits were displayed on Zoom in a clear fashion, including video evidence like the police bodycam, and there were no objections to not being able to see or hear all the evidence.¹³

Besides bench trials, most of my virtual court have involved one-on-one interactions with defendants who have pled guilty or no contest and want to discuss with me their particular situation. I have found these interactions do mirror the personal interaction that occurs in the courtroom. The problems inherent with online communication, such as technical issues or the fact we were not in the same room, were minimal and were outweighed by the speed and ability to talk to a defendant and vice-versa in a safe manner. Defendants in fact appeared to be more relaxed talking to me from my study and their house than peering up to me dressed in a black robe on a bench in a courtroom.

Attorneys as well have commented that even post-pandemic some of these low participant simple hearings should be done virtually in the future. Texas is a big state. Attorneys are able to appear in multiple courts in various cities and counties virtually more easily than travelling in-person to different courtrooms and courthouses.

In fact, in late September 2020, as chairperson of the Public Trust and Confidence Committee of the Texas Judicial Council, I supported and subsequently the Judicial Council voted to approve creating legislation to remove the current obstacles in place to judges employing virtual technology. At the current time, our use of virtual technology is dependent on the Texas Supreme Court's emergency orders which expire once the Governor's declaration of emergency is lifted. There will be instances post-pandemic when judges may find that court access increases with the use of virtual technology: particularly with attorneys, witnesses, and parties in remote areas; children in family law cases; and finding interpreters who are not necessarily available physically near a courthouse. Virtual appearances will never

¹³ For a contrasting view perhaps, the Pennsylvania Supreme Court on September 17, 2020 issued an order stopping Philadelphia courts from livestreaming criminal cases on YouTube at the request of the Philadelphia District Attorney. See First Judicial Livestream Policy, SUPREME COURT PA. (Sept. 17, 2020), <http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20-%20104549046113115014.pdf?cb=1>; Vinny Vella, *Pa. Supreme Court Halts Philly Criminal Trials Streamed on YouTube over Possible Harassment*, PHILADELPHIA INQUIRER (Sept. 17, 2020), <https://www.inquirer.com/news/youtube-broadcasts-philadelphia-supreme-court-krasner-20200917.html>. While public access to a courtroom is different from YouTube livestreaming, the implications of these differences and the ability to allow the public open access to what is occurring in our courts during the pandemic is an evolving concept and challenge.

replace in-person testimony, but there are times where virtual technology definitely has increased access to our courts.¹⁴

As everyone who has participated in Zoom meetings knows well, there are noticeable differences between online interaction and in-person meetings. Everyone is in a different room. Whether this is for the good or bad I am not completely clear. I have found the most satisfaction with the use of Zoom in my one-on-one interactions with defendants.

At the beginning of the pandemic, the police filed a number of new offenses specifically tied to the shelter in place rules. Through a Zoom invite I was very quickly able to “bring a defendant into court” in a more relaxed atmosphere. I was not wearing a judicial robe in the courtroom but appeared from the study in my house. The defendants were at home. All of the defendants with the shelter in place citations pled guilty or no contest and thus I was able to talk to them immediately about the circumstances of the offense. I placed them on a short probation with a dismissal upon no new similar offenses and a quick expunction six months after the offense date. The virtual hearing process was definitely a swifter way to communicate with defendants in a fairly understandable and personal forum than conducting these hearings in court with the subpoenas and scheduling involved with in-person dockets. In a limited one-on-one hearing with a defendant charged with a fine-only offense, making court more personable and accessible creates a fairer and more efficient atmosphere. The shelter in place Zoom hearings definitely from my experience achieved this.

An important role of courts is to try to achieve a result that avoids defendants returning back to a criminal court with future offenses. Thus, I spend a lot of time educating defendants, particularly defendants under the age of twenty-five, on the collateral consequences of misdemeanors and how to expunge their cases. The virtual court has allowed me to quickly reach out to defendants and discuss their punishment and these collateral consequences in a relaxed and understandable way. I also have posted a video through our YouTube page on how to close early and clear one’s case through expunction. I require defendants placed on probation for non-traffic offenses to watch this video.¹⁵

From an examination of streaming Zoom hearings in Texas, it appears that a majority of judges over time are conducting their virtual Zoom hearings in their courtroom. Often the judges are wearing a black robe while on the bench. This makes sense as courthouses have opened, and judges have gone back to work. While courthouse lobbies have opened, the Texas Supreme Court has urged the continued

¹⁴ TEX. JUDICIAL COUNCIL, PUBLIC TRUST AND CONFIDENCE COMMITTEE REPORT AND RECOMMENDATIONS, 4–6 (2020), https://www.txcourts.gov/media/1449779/ptc-committee-20200923_final.pdf.

¹⁵ COLLEGE STATION MUNICIPAL COURT’S YOUTUBE CHANNEL, https://www.youtube.com/channel/UCIggUEEFA85FWybqHVPTWFQ/videos?view_as=subscriber. Along with hearings, trials, and educational instruction, we have two Zoom weddings on the page.

use of virtual hearings and avoidance of any in-person hearings.¹⁶ The Texas Supreme Court as well has prohibited jury trials except with their specific approval. It would appear from docket sheets that a vast majority of hearings are still occurring via Zoom.

One drawback of Zoom hearings I have noticed and has been reported to me from various judges and participants is that there is a difference in feelings and ability to speak between in-person and screen interactions. This is true as the number of participants in a hearing increases. Judges have less control over the atmosphere when it is online versus in-person. Being able to see everyone, remove distractions, and quickly eliminate impediments to the focus of a particular court hearing is so much easier in court than it is during a Zoom hearing. In fact, it is impossible for a judge to see all the distractions during a Zoom hearing. Also, despite the ability to mute a participant, a judge does have to allow microphones to be on for any objections.

From a participant's perspective, I have heard, though have seen no research on this, participants feel less comfortable speaking during virtual meetings. There's a feeling of awkward interruption or speaking over individuals during a Zoom call due to the lack of knowledge when others will speak or that there is an opportunity to speak. Participants have reported to me that they often will not say something due to this slight awkwardness or inability to know exactly that they can speak. In court, when an attorney or a pro se defendant wishes to address the court, he or she can stand up and command attention directly. If these virtual meetings continue, judges need to allow proper time and space for everyone to speak in ways differently from in-person meetings. It is harder for a judge to apprehend that a party wishes to speak during a virtual hearing, unless the judge specifically asks that very question: "Do you wish to say anything?"

Reliance on technology is more a controlling dominant factor during virtual hearings. In-person meetings do not rely completely or sometimes ever on technology to occur. While the Zoom technology does not take long to understand or operate, it relies on various participants to embrace using it and their computers or other devices connected to the internet functioning well.

IV. HYBRID HEARINGS

Hybrid trials are trials in which some of the participants are in the courtroom and some appear virtually. I have not held such hybrid hearings or trials and have not read of any journalistic reports on these hearings. However, from other judges and participants, I have been told that it appears, at least to the participants, that those appearing in-person have a clear advantage in the hearings. These hybrid

¹⁶ Since March 13, 2020 through September 18, 2020, there have been twenty-six Emergency Orders from the Texas Supreme Court regarding the Covid-19 State of Disaster. *See Administrative Orders*, TEX. JUDICIAL BRANCH, <https://www.txcourts.gov/supreme/administrative-orders/2020> (last visited Feb. 21, 2021).

hearings emphasize the potential shortcomings of virtual trials. When you are in-person in a courtroom, you can command and observe nonverbally the attention of others. This ability to read the room instantly is almost completely absent in Zoom hearings. Hearings and trials often demand instant decisions to speak and the practice of standing up for an objection is completely different in-person than the interrupted nature of objections during Zoom hearings. While hybrid hearings allow hearings and trials to move forward, maintaining safety for those participants at least appearing virtually, there is a particular need for the judge to work hard on not providing an unfair advantage to those appearing in-person. Ironically, pre-pandemic, this may support the case for the very limited allowance of individuals to appear in criminal settings virtually.

V. COURTS' WORK OUTSIDE OF HEARINGS AND TRIALS

Access to court involves more than the maintenance of court dockets. If the doors of the courthouse are literally locked, parties need to have an ability to communicate with the court. For those courts wherein a proportion of their cases originate through citations, parties, especially pro se citizens, depend on being able to make their pleas and communicate with the court in a fairly swift manner, often closing their case without any other hearing beyond pleading no contest or guilty and paying a fine and receiving guidance on any other requirements. When the pandemic forced the shutdown of most courthouses, the pro se defendant could perhaps feel particularly lost. While the Texas Supreme Court had mandated that deadlines be lifted, many citizens would not be aware their deadlines were not in place but for direct communications during the shutdown from the particular court where their cases have been filed.

As noted, when we closed down our courthouse, our court provided email addresses for defendants to contact us; our website had an online option for interaction and payment; all our clerks were able to take phone calls made to our court; the mail was daily picked up and filing maintained. We also proactively reached out to all defendants by phone to assure them that deadlines were lifted, community service and in-person classes were waived, and defendants could communicate with us electronically through phone calls or on Zoom. Importantly, we were able to gather contact information. Cell phone numbers have been the most consistent and longstanding contact link with our defendants and witnesses, even compared to mailing or email addresses. From these calls, our clerks reported that they had never before experienced so many changes in defendants' circumstances: from employment status to where defendants were living.

On May 11, 2020 we did open our courthouse doors and our lobby for limited interaction between defendants and our court staff: making pleas, turning in paperwork, and completing payment plan applications. Our efforts to do as much as we could virtually versus in-person included the creation and emailing of payment plans, waiving cases, sending and receiving electronically other paperwork, and holding hearings and trials via Zoom. These efforts continue to this day.

VI. JAIL

Spending time in jail during a pandemic entails obvious health and safety dangers. Jails are confined spaces in which it is very hard to maintain social distancing and hygiene. I am not only a municipal court judge but, under Texas law, I am also a magistrate. As a magistrate I am able to find probable cause on those arrested and determine the appropriate bond. On the misdemeanor offenses I oversee, I, without exception, release defendants immediately upon booking with a personal recognizance bond.¹⁷

This policy of immediately releasing defendants arrested for Class C misdemeanor offenses frees me of the challenges facing other judges in terms of deciding whether to release defendants due to a fear of spreading Covid-19 and thereby possibly killing defendants because they were in jail. Also, judges setting bonds on defendants awaiting trial or sentencing defendants to jail must consider the overall health of not only the defendant but the community where the jail is located, since the jail itself can be a virus “hotspot.”

In Texas, the administrative head of the county is titled and elected as the “county judge.”¹⁸ Several Texas county judges have attempted to release defendants housed in their jails for nonviolent offenses. In Texas’ most populous county, Harris County, the county judge’s attempt to release defendants was met either with a district judge’s order claiming the county judge lacked jurisdiction to release defendants already indicted into district courts or the governor’s executive order prohibiting release on personal bond any defendant charged with an assault offense or having had any assault charge in the defendant’s criminal background. The constitutionality of the governor’s changing of the law through executive order, limiting the power of magistrates to release via personal bond, is still under review.¹⁹

According to the Marshall Project and the Texas Department of Criminal Justice data, Texas leads the nation in terms of the number of inmates with Covid-19 in prisons. As of August 11, 2020, 18,495 inmates and 3,972 prison employees have tested positive for Covid-19.²⁰ This does not include data from county jails.

¹⁷ By my standing order, the only exception to this is that I put a hold on releasing defendants charged with intoxication offenses until the defendant is sober and assault cases in order to determine whether the victim desires a protective order. With both offenses, defendants are released within twenty-four hours after being booked in jail.

¹⁸ TEX. CONST., art. V, § 15 (amended 1954).

¹⁹ See St. John Bamed-Smith and Gabrielle Banks, *Judge voids Harris County Order to Release Jail Inmates to Battle Coronavirus*, HOUS. CHRONICLE (Apr. 3, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-releases-get-under-way-to-15177262.php>; Jolie McCullough, *Harris County Judges, ACLU sue Greg Abbott Over Order Limiting Jail Releases during Pandemic*, TEX. TRIBUNE (Apr. 8, 2020), <https://www.texastribune.org/2020/04/08/greg-abbott-coronavirus-jail-order-sued-harris-county-judges-aclu/>.

²⁰ *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last updated Feb.

Locally, in my county, Brazos County, one inmate died in the County Jail of Covid-19 in early August 2020. In total 44 inmates out of a jail holding 555 prisoners have tested positive and there are as of August 2020 seven jail officers with active positive cases.²¹

VII. JURY TRIALS

Probably the hardest challenge during this pandemic is holding jury trials. Jury trials involve so many participants, and there are rare reports of jury trials occurring virtually. During the pandemic, holding events in-person involving numerous citizens from various households has been difficult to impossible. The Executive Director of the Texas Municipal Courts Education Center, Ryan Turner, told me that movie theaters, bar exams, and schools are “canaries in the coal mine” for predicting when in-person legal education can begin. As of this date, all continuing legal education in Texas is online.

A jury trial is similar to attempting to hold a legal education conference. The court is summoning numerous individuals from various households without a strong grasp of everyone’s connections to other citizens and their overall health. Part of the point of jury trials is to get a diverse sampling of the public. In fact, during the pandemic, initial surveys indicated that those responding to potential jury summons would not be as diverse as the usual array assembled.²² Judges have a concern over not just the health of the parties and court staff involved in cases but also the welfare of a diverse jury pool.

A lack of consistency in court procedures can always reduce the confidence overall in the local criminal justice system. All participants, potential jurors, attorneys, defendants, prosecutors, probation officers, and court staff, must possess an overall faith that procedures are carried out with equal measure for the convoluted process to work in the best of times. During the pandemic, when all citizens are concerned about their and their family’s overall health, consistent practices can support every party’s attempt to “keep the courts running” while also being mindful of everyone’s rights and safety. From a global perspective, courts operating under vastly different procedures undercut the public’s perception of fairness. As stated, many jurors experience criminal court through municipal court. It is important the procedures in municipal court possess the same constitutional procedural safeguards as those followed by other courts, no matter the seriousness of the criminal charge.

19, 2021).

²¹ Rebecca Fiedler, *Brazos County Detention Center Inmate with COVID-19 Dies at Hospital*, THE BRYAN COLLEGE STATION EAGLE (Aug. 11, 2020), https://theeagle.com/news/local/brazos-county-detention-center-inmate-with-covid-19-dies-at-hospital/article_9732da4c-dc4b-11ea-b4bf-238b598056ff.html.

²² Mark Curriden, *Harris County Juries Projected to be Whiter, More Conservative as the Pandemic Persists*, HOUSTON CHRONICLE (July 2, 2020), <https://www.houstonchronicle.com/business/article/harris-county-jury-white-male-conservative-covid-15380341.php>.

In criminal cases, the right to a jury trial is a fundamental right. “Justice delayed is justice denied.”²³ On the other hand, a jury trial is the hardest, if not impossible, procedure for courts to hold in-person in a safe manner during this pandemic. Legally innocent defendants awaiting their jury trials while in jail is another pressure courts face with delays and shutdowns caused by the pandemic. The shutdown of jury trials also creates a problem for judges with all of their dockets in the sense that the threat of a jury trial often provides an incentive for the State and the Defense to settle cases through pleas, dismissals, or bench trials. When both or either side realizes that the jury trial is not going to take place, the settlement of the case also may not occur. This same stalling of other dockets due to the shutdown of jury trials would in theory affect civil courts as well in terms of settlements slowing down. Balancing health and safety concerns with paralyzed dockets has been one of the chief challenges all judges face during this time. In mid-August, several judges of the largest municipal courts in Texas reported to me that they had noticed more defendants and defense attorneys requesting jury trials. The reason for requesting a jury trial does not and should not have to be stated. We all have the right to a jury trial in Texas for any criminal charge, even one involving a traffic citation.

The passing of time, like other events during the pandemic, has caused judges to examine what exactly the balance should be between public safety and the need to restart jury trials. Judges have attempted to examine other creative ways to have jury trials through the virtual technologies employed rather quickly for nonjury hearings. Jury trials appear to be particularly unique in not being easily adaptable or acceptable to virtual technology. The lack of control the judge has on the various outside of court distractions each participant faces is multiplied several times over when conducted online. Also, each of the parties face some quantum of loss when they are not able in-person to examine jurors during the very important voir dire examination to study body language, facial cues, and other subtle nonverbal perceptions, impossible or very difficult to apprehend in a virtual environment. All of these negative aspects of online technology are to be balanced out with the fact that an in-person jury trial involves requiring citizens to come to a court case in which he or she does not have a personal interest and risk perhaps literally losing his or her life to serve on the jury during the pandemic. If citizens summonsed to court refuse to come to fulfill their jury duty, how can a defendant truly be judged by his or her peers?

Another challenge is how to deal with the pandemic specifically. What type of jurors will show up? What type of questions can you ask in terms of health? What type of excuse allows jurors to be exempted from duty? Can just a fear of catching Covid-19 be sufficient cause not to come to court? To the extent that health and safety measures such as wearing a mask have been politicized, how will that affect the type of juror who would feel comfortable serving on a jury at this time?

²³ Legal maxim of unknown origin. See William Penn, *Some Fruits of Solitude* 86 (1693) (Headley, 1905).

The net result is that as of the end of August 2020 very few jury trials had been reported as occurring in the United States. The National Center for State Courts reported that holding jury trials had been explicitly prohibited in twenty-four states and the District of Columbia and strongly discouraged via local orders in twenty-one states.²⁴ Only four States have no orders in effect for jury trials. An examination of the few jury trials attempted illustrate the dangers of in-person jury trials. In Texas, according to the Office of Court Administration, 5,400 jury trials would have been typically held between March and September and only thirty jury trials had been held during that period this year. Approximately fifty percent of the usual jury trials involve criminal offenses where jail time was a possibility.²⁵ It is not surprising that there would be defendants in jail awaiting trials that have not taken place.

On April 28, 2020, an Ohio judge attempted to hold what was called “the nation’s first in-person jury trial since shutdown orders began.”²⁶ During jury selection, the defendant, on trial for endangering a child, was noticeably uncomfortable and leaned on defense counsel’s shoulder, nearly fainting. He had to be taken out of the courtroom on a stretcher in the presence of the potential jurors and hospitalized. His tests came back negative for Covid-19 that day and the trial judge ordered everyone to resume the next day, April 29. After several defense attorneys including the defendant’s attorney objected, the judge backed down and agreed to continue proceedings. The trial had been livestreamed so numerous observers around the country witnessed the near impossibility of holding this “first in-person jury trial.” Besides the difficulties of maintaining a safe environment in the courtroom, lawyers and clients expressed an inability to communicate successively while being safely apart and wearing masks. Also, participants noted that jurors told the judge they felt fine with the safety precautions but could be overheard in the hallway expressing concerns.²⁷

On May 18, 2020 a Texas judge attempted to hold a nonbinding one-day civil jury trial with jury selection to verdict completed online. Again, this was announced as perhaps a “first” in the nation by the judge and was able to be witnessed through livestreaming. The proceeding was a summary jury proceeding, in which civil litigants are able as part of dispute resolution to try their case to a nonbinding jury

²⁴ *Statewide Jury Trial Restrictions*, NAT’L CTR. OF STATE COURTS, <https://www.ncsc.org/newsroom/public-health-emergency> (as of Aug. 24, 2020).

²⁵ TEX. JUDICIAL COUNCIL, DIRECTOR’S REPORT, 15 (Sept. 2020), <https://www.txcourts.gov/media/1449762/directors-report-september-2020-final.pdf>.

²⁶ Debra Cassens Weiss, *State Supreme Court Allows In-Person Jury Trial, Which Ends with Defendant Nearly Collapsing*, ABA J. (May 1, 2020), <https://www.abajournal.com/news/article/after-top-state-court-allows-in-person-trial-trial-ends-with-defendants-near-collapse>.

²⁷ Cory Shaffer, *An Ohio Judge Determined to Hold a Trial, a Defendant Removed from the Courtroom with Coronavirus Symptoms Illustrate Perils of Pandemic-Era Trials*, CLEVELAND.COM (May 1, 2020), <https://www.cleveland.com/court-justice/2020/05/an-ohio-judge-determined-to-hold-a-trial-a-defendant-removed-from-the-courtroom-with-coronavirus-symptoms-illustrate-perils-of-pandemic-era-trials.html>.

before the full case is heard. Besides various technical problems inherent with virtual court such as the ability to hear and having the mute button on when speaking, one juror left to take a call during a break and did not return when asked. Eventually the juror did return on his own.²⁸ The national show *Inside Edition* showed portions of the trial including the judge asking the missing juror to come back to the trial.²⁹

In July 2020, however, in Texas there were attempts to formulate plans to resume in-person jury trials in some cities. In Harris County, where the city of Houston is located, the district clerk sent out jury summons to form grand juries in which citizens gathered at a large arena. The citizens were given face shields so the attorneys could see their facial expressions and were seated in the large arena six feet apart. One attorney who witnessed this setup complained in his blog that this process was similar to a game show host on *The Price is Right* running up and down rows of seats in an attempt to note answers to his questions.³⁰ Microphones now are on each juror's chair and jury selection occurs in this large arena. Actual trials are planned to be held in courtrooms large enough to allow social distancing.³¹

In San Antonio, Texas, judges are trying to develop a way to hold virtual jury trials for civil cases, with both sides agreeing to a limited number of six jurors. The plan is to have jurors serve from voir dire through verdict on the Zoom platform. For those jurors who do not possess internet access or electronic devices, Bexar County will provide hot spots and wireless devices through BiblioTech, the county's online digital library.³² This program was set to begin in mid-August. However, right after the first panel was sworn in and read the initial jury qualification requirements, the judge released the citizens because none of the attorneys consented to a virtual civil jury trial.³³ As of September, no attorneys have agreed to virtual civil trials. The

²⁸ Charles Scudder, *In a Test Case, Collin County Jury Renders Verdict on Zoom for the First Time; Too Risky for a Full Trial?*, THE DALLAS MORNING NEWS (May 22, 2020), <https://www.dallasnews.com/news/courts/2020/05/22/in-a-test-case-collin-county-jury-meets-on-zoom-for-the-first-time-but-some-lawyers-say-its-too-risky-for-real-trial/>.

²⁹ Inside Edition Staff, *How First Ever Zoom Jury Trial Held by Texas Court Is Going*, INSIDE EDITION (May 20, 2020), <https://www.insideedition.com/how-first-ever-zoom-jury-trial-held-by-texas-court-is-going-59681>.

³⁰ Murray Newman, *COVID, Jury Selection and Item Fifteen*, LIFE AT THE HARRIS COUNTY CRIM. JUST. CTR. BLOG (July 11, 2020), <http://harriscountycriminaljustice.blogspot.com/2020/07/covid-jury-selection-and-item-fifteen.html>.

³¹ The District Courts of Harris County and the Harris County District Clerks Office, *Justice Requires Jurors, a COVID-19 jury trial safety video presentation*, <https://www.youtube.com/watch?v=f65jtGM1r0k&feature=youtu.be>.

³² David Ibanez, *First for Bexar County: Residents to Sit on Jury Panels from Home*, KSAT LOC. NEWS (July 23, 2020), <https://www.ksat.com/news/local/2020/07/23/first-for-bexar-county-residents-to-sit-on-jury-panels-from-home/>.

³³ Angela Morris, *'Guess What?' Texas' First Zoom Civil Jury Fizzles as No Attorneys Consent to Proceed Before Remote Jury*, LAW.COM (Aug. 19, 2020), <https://www.law.com/texaslawyer/2020/08/19/guess-what-texas-first-zoom-civil-jury-fizzles-as-no-attorneys-consent-to-proceed-before-remote-jury/>.

administrative judge has stated after October 1, 2020, they may mandate virtual civil trials since they do not need the parties' consent after October 1st.³⁴ Once again, there appears to be a collective conclusion virtual trials are not appropriate, fair, or just for jury trials.

Finally, on August 11, 2020, a justice of the peace in Austin, Texas held a criminal jury trial over a "speeding in a construction zone" ticket. The judge conducted the complete jury trial using Zoom. He created rooms where attorneys could confer privately with clients and witnesses and the jury could eventually deliberate in secret. During this trial, one of the jurors' screens froze, but the trial did manage to conclude to a verdict of guilty for speeding and a finding that the offense was not in an active construction zone. The defendant was assessed a fine of \$50. The judge told the jurors that they were participating in history as the first virtual jury trial perhaps in the world. He also told *The Washington Post* that this operation may not have worked for a more "serious" offense and the stakes were low given that this was a fine only offense.³⁵

There can be several reactions to this story and the fact at least in print there are very few accounts of jury trials occurring in the United States. Many citizens may be surprised that a traffic case such as speeding is a criminal offense in which defendants have the right to a jury trial. In Texas, such an offense is criminal and in fact defendants have a right to a jury trial even for a parking in a handicap space. There appears to be a subtext from the judge's remarks that a jury trial at present can only work for a less "serious" case due to the fact that it is a fine-only case with "low stakes." At least, that is what the judge appeared to say to *The Washington Post*.

To this first point, perhaps that is an argument to not make traffic cases criminal. However, in Texas they are criminal; therefore, should not every jury trial from a procedural perspective possess the same constitutional guarantees to a fair trial as any other criminal trial? Fine-only offenses like traffic violations, assaults, possession of drugs or drug paraphernalia, theft, disorderly conduct, or public intoxication carry direct and collateral consequences that can affect citizens often as much or more than more "serious" offenses, whatever those may be. Was not the point and conclusion of the United States Department of Justice's investigation into the city of Ferguson, Missouri's municipal court and police department that the prosecution of citizens under these offenses can have life-changing effects, especially when the basic constitutional laws already in place for decades are not followed in regard to fine, fees, and bail!³⁶ Whether all the offenses that are criminal

³⁴ Elizabeth Zavala, 'It's Truly a New Age'—Bexar County Administrative Judge Plans for Virtual Jury Trials in October; In-Person in January, SAN ANTONIO EXPRESS-NEWS (Sept. 10, 2020), <https://www.expressnews.com/news/local/article/It-s-truly-a-new-age-Bexar-County-15555560.php>.

³⁵ Jouvenal, *supra* note 8.

³⁶ See generally Gwynn Guilford, *These Seven Charts Explain How Ferguson and Many Other US Cities Wring Revenue from Black People and the Poor*, QUARTZ (Aug. 28, 2014), <https://qz.com/257042/these-seven-charts-explain-how-ferguson-and-many-other-us-cities-wring-revenue-from-black-people-and-the-poor/> (showing that in 2013, 24,532 warrants were issued from the Ferguson Municipal Court, accounting for three warrants per household in Ferguson, Missouri. The

and fine-only should stay that way is for legislatures to decide. As long as a particular offense is a criminal offense, the charged defendant possesses the same constitutional protections of a proper, just, and fair jury trial as any other criminal defendant.

Secondly, there have been very, very few jury trials. While the justice of the peace may mean well by declaring that everyone made history during the virtual trial through zoom, perhaps this is “historic” because judges around the country realize that conducting a virtual jury trial does not afford the ability of the defendants to receive fair trials as we understand them to be presently and conducting in-person trials with high infection rates in the community is not safe. The words “first in the world” have appeared often in the few accounts of attempted jury trials. Covid-19 has made conducting in-person jury trials unsafe and virtual jury trials do not appear to be just.

Many defendants charged with low level misdemeanors and certainly fine-only criminal charges represent themselves. It is very conceivable that pro se defendants and citizens as potential jurors might agree, or be convinced by courts eager to clear dockets, to participate in essentially glorified Zoom meetings as “jury trials.” While the declarations of completing jury trials so far have been minimal and often mirror the emotion of someone climbing Mount Everest, it may be heartening, at least nationally, judges have not pushed defendants and other participants into jury trials. Jury trials must occur in-person to retain their unique fairness. Individual judges and communities have to decide when and how it is safe to hold in-person jury trials. So far, the vast majority of courts have determined it is not safe at this time, six months into the pandemic.

In Texas, for misdemeanor criminal cases six jurors sit with each side receiving three peremptory challenges, and in felony cases, twelve jurors sit with each side receiving ten peremptory challenges.³⁷ To add to the potential safety concerns, as insurance, many judges have planned to have alternate jurors in case a juror becomes sick and cannot serve. It is amazing that in the few jury trials reported in the press, most courts faced a major issue in carrying out the trial. Not only are these problems possible grounds for reversal but they undercut the public’s confidence in jury trials themselves. In our local county, Brazos County, a mistrial in a felony jury trial was declared when the jail transported the defendant in a van with another inmate who was positive for Covid-19.³⁸

As of September 2020, there have been very few jury trials or even attempts to hold jury trials in Texas. I have not held a jury trial and have not in any way sent summons out to citizens for a future potential jury trial. I did not want to create more

impact of fine-only misdemeanor offenses in Ferguson, Missouri demonstrates how pervasive minor criminal offenses can be in citizens’ daily lives).

³⁷ TEX. CODE CRIM. PROC. ANN. art. 33.01, 33.011, 35.15 (West).

³⁸ Adrienne DeMoss, *Mistrial in Brazos County After Inmate with COVID-19 Accidentally Brought to Courthouse*, KBTX NEWS (Aug. 19, 2020, 4:16 PM), <https://www.kbtx.com/2020/08/19/mistrial-in-brazos-county-after-inmate-with-covid-19-accidentally-brought-to-courthouse/>.

stress in citizens' already anxiety-filled lives with a legal order to come to court. In July, August, and September, many citizens, hence potential jurors, were grappling with the anxiety regarding sending their children to school in-person or online. The pandemic was so virulent in Texas that many major cities started school completely online.³⁹ While various plans indicate judges' desire to attempt to resume jury trials, the uptick in infection rates in Texas this summer seemed to all but vanquish any ability to hold jury trials until perhaps next year.

I have found my other dockets have progressed. This has all occurred while Texas faced increasing infection rates all summer and my particular city, College Station, faced an increase in Covid-19 active cases once Texas A&M University began the fall semester. Every week I challenge my court staff to work towards handling court as completely as we can without in-person interactions. One citizen even had tears of joy when she realized she would not have to come physically to court. She told me over Zoom her children appreciated this as well.

At some point jury trials will resume. However, without lower infection rates or the introduction of an effective vaccine, jury trials for the most part cannot occur. Like everything with Covid-19, we are with each passing day engaging in a form of "Russian Roulette": balancing the need for the important work of courts to proceed with not only the safety of citizens but the actual lives of those participants. If we do not obtain a vaccine in the fall or winter, the march of time may dictate that we find a way to conduct jury trials. Time will change the balance. However, at this time we need as judges to be honest with citizens and all court participants about the dangers of in-person jury trials as we sit socially distant and safe on our benches. We need to conduct whatever we can through virtual court. Any hearing we conduct in-person we need to either avoid or explain to those participants why the risks versus working dockets demand these actions.

The desire by judges to keep their courts open and functioning during the pandemic is not only important but praiseworthy. The fact that judges have almost universally strove to maintain the fairness implicit, but not always quantifiable, that lives and breathes during in-person procedures should provide confidence in our pre-pandemic institutions. Texas Supreme Court Chief Justice Hecht's words ring true: "Since the onset of the pandemic, courts throughout the country have determined to stay open to deliver justice without faltering, no matter the adjustments and sacrifices demanded, but also to protect staff . . . and the public from the risks of disease. We are learning new technology and practices together."⁴⁰

³⁹ Inyoung Choi, *Texas Will Allow Schools to be Online-Only Through November as the State Passes 300,000 Coronavirus Cases*, BUSINESS INSIDER (July 17, 2020, 4:25 PM), <https://www.businessinsider.com/texas-schools-may-be-online-only-november-hybrid-model-2020-7#:~:text=Texas%20will%20allow%20schools%20to,state%20passes%20300%2C000%20coronavirus%20cases&text=Texas%20schools%20may%20be%20allowed,Texas%20Education%20Agency%20announced%20Friday>.

⁴⁰ Nathan Hecht, *Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency>.